

¹R.H. Trans. at 5 (May 15, 2003).

ISSUES

In Docket No. 247,435 claimant seeks review and modification of an Agreed Award entered September 5, 2000 whereby claimant was awarded permanent partial disability compensation based upon an 11 percent functional impairment to the body as a whole for a July 9, 1999 injury to claimant's bilateral upper extremities. Docket No. 259,702 is a claim for a series of accidental injuries to both of claimant's shoulders, hands and wrist, his left elbow, head, and his upper and lower back during the period beginning September 20, 2000 and ending June 19, 2002, his last day worked.² Respondent terminated claimant for cause from an accommodated job and Judge Fuller determined claimant was not eligible for a work disability in either docketed claim. Instead, claimant's permanent partial disability award was limited to his stipulated percentages of functional impairment, which in Docket No. 259, 702 was 16.5 percent.

Claimant argues he is permanently and totally disabled as a result of his work-related injuries in Docket No. 259,702. In the alternative, claimant contends that he was terminated in bad faith and is entitled to an award based on a work disability. Claimant also contends the ALJ erred by not modifying his award in Docket No. 247,435 to a work disability.

Conversely, respondent contends that the ALJ's Award/Decision should be affirmed in all respects. Respondent argues claimant was terminated for misconduct not associated with his work-related injuries and not the result of bad faith on the part of the respondent. Accordingly, respondent argues claimant is not entitled to a work disability award because he would have remained employed by respondent earning a comparable wage had he not been terminated for violation of respondent's policies.

The nature and extent of claimant's disability are the only issues for Board review in both docketed claims.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record, considering the briefs and the parties' oral arguments, the Board makes the following findings and conclusions:

The ALJ's Award/Decision sets out findings of fact and conclusions of law in some detail. It is not necessary to repeat those findings and conclusions in this Order.

² R.H. Trans. at 10 and 11. But claimant's Form K-WC E-1 Application for Hearing filed Oct. 19, 2000, and Form K-WC E-3 Application for Preliminary Hearing filed May 22, 2001, both alleged a "Series of injuries culminating on 9/20/00 and continuing everyday thereafter."

The Board adopts the findings and conclusions of the ALJ as its own as if specifically set forth herein.

The record includes claimant's testimony, the testimony of claimant's supervisor Martin Chamu, the testimony of Dave Stafford who was respondent's human resource manager at the time of claimant's termination and the testimony of co-workers Jesus Valdez, Lisa Sanchez and Santos Alvidrez. All of these witnesses testified concerning the facts leading up to claimant's termination. The ALJ's Award/Decision accurately summarizes their testimony. Although claimant makes a plausible argument to the contrary, the Board finds the greater weight of the evidence establishes that claimant violated respondent's policy against eating its product and that claimant's termination was not wrongful nor done in bad faith.

The test of whether a termination disqualifies an injured worker from entitlement to a work disability is a good faith test on the part of both claimant and respondent.³ In this case, claimant was terminated for violating respondent's policy. Although claimant disputes the factual basis for the termination, the Board finds the record fails to establish that the termination was made because of claimant's work-related injuries or in bad faith. In fact, the Board finds that the greater weight of the evidence supports a finding that claimant did eat meat at work as alleged. The Board concludes claimant's actions were a willful and knowing violation of the respondent's rule and policy. As such, claimant's conduct was tantamount to a refusal to perform appropriate work as in *Foult*⁴ or a failure to make a good faith effort to retain appropriate employment as described in *Copeland*.⁵ Accordingly, because claimant was terminated for misconduct, the wage he was earning and would have continued to earn had he continued working for respondent should be imputed to him. As this was at least 90 percent of his average weekly wage, his permanent partial general disability award is based upon his permanent functional impairment.⁶

The claimant also argues that even if he was terminated for cause from an accommodated job that was within his restrictions, he remains entitled to a work disability because his termination was not in good faith. In *Niesz*⁷ the Court found that where a

³ See *Helmstetter v. Midwest Grain Products, Inc.*, 29 Kan. App. 2d 278, 28 P.3d 398 (2001) and *Oliver v. The Boeing Company*, 26 Kan. App. 2d 74, 977 P.2d 288, rev. denied 267 Kan. 889 (1999).

⁴ *Foult v. Colonial Terrace*, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), rev. denied 257 Kan. 1091 (1995).

⁵ *Copeland v. Johnson Group, Inc.*, 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

⁶ See *Ramirez v. Excel Corp.*, 26 Kan. App. 2d 139, 979 P.2d 1261, rev. denied 267 Kan. 889 (1999).

⁷ *Niesz v. Bill's Dollar Stores*, 26 Kan. App. 2d 737, 993 P.2d 1246 (1999).

claimant's termination was not made in good faith because respondent inadequately investigated the facts relating to the termination there could still be an award of work disability. In this case, however, respondent conducted an adequate investigation of the facts. Furthermore, claimant failed to avail himself of available grievance and appeal procedures.

Claimant also contends he is entitled to a work disability because he was unable to perform the accommodated job. In support of this argument is the *Guerro*⁸ case. In that case the claimant made a good faith effort to perform an accommodated job that was within her restrictions but which caused her pain. She was terminated but was still eligible to receive a work disability award. The evidence in this case, however, is that claimant was able to perform the accommodated job. He even asked for that job back after he was terminated.

Each time he testified, November 5, 2002, May 15, 2003 and July 10, 2003, claimant said he was still not working but had been actively seeking employment. He had sought various types of jobs including at retail stores and restaurants. He had also applied to do car sales and repair work, construction work and delivery truck driving. Claimant had even re-applied to work for respondent. Claimant said he would like to have his former job back. The Board finds claimant is not completely and permanently incapable of engaging in substantial and gainful employment.⁹

Claimant is not entitled to a work disability in either docketed claim because he was terminated for cause from an accommodated job which was within his restrictions. In addition, the evidence suggests that respondent would have further accommodated claimant if necessary. As to his Application for Review and Modification, claimant failed to prove any increase in disability beyond the percentage of functional impairment that was stipulated to and awarded in the Agreed Award.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award/Decision and the Order Nunc Pro Tunc entered by Administrative Law Judge Pamela J. Fuller dated August 27, 2003 and September 8, 2003, respectively, should be, and are hereby, affirmed.

IT IS SO ORDERED.

⁸ *Guerro v. Dold Foods, Inc.*, 22 Kan. App. 2d 53, 913 P.2d 612 (1995).

⁹ See K.S.A. 44-510c(a)(2).

Dated this _____ day of February 2004.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: C. Albert Herdoiza, Attorney for Claimant
D. Shane Bangerter, Attorney for Respondent
Pamela J. Fuller, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director